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No. 10-925

IN THE

Supreme Court of the United States

GRAND TRUNK WESTERN RAILROAD, INC.,
Petitioner,

v.

WILLIAM E. SHEPARD,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Ohio, Eighth Appellate District

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief as *amicus curiae*. Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to counsel for Respondent of AAR's intent to file a brief. Respondent has not provided consent.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, and the Locomotive Inspection Act (LIA), 49 U.S.C. §§20701-20703, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a federal negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year, thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources, expending hundreds of millions of dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

AAR's members are greatly concerned over the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of an important federal railroad safety regulation. The ruling that the regulation was violated if any diesel exhaust enters a locomotive cab, which was contrary to the FRA's interpretation of a rule that it promulgated and enforces, amounted to a finding that the defendant was negligent as a matter of law. This ruling has the potential greatly, and improperly, to expand FELA liability in a manner inconsistent with the views of the expert federal agency.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Moreover, AAR has had long-standing involvement with the subject of rail safety, and participates in all significant railroad safety rulemaking proceedings conducted by the FRA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members both in FELA litigation and in the field of safety regulation.

In its brief, AAR will show that the lower court's failure to defer to the FRA's interpretation of a federal railroad safety regulation on diesel exhaust has the potential to affect the outcome of many future FELA cases to the detriment of railroad defendants. Thus, as a trade association representing the nation's major railroads, AAR has an interest not only in assisting the Petitioner in obtaining relief from an erroneous decision, but also in assuring that an

important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The interest of *amicus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File a Brief which is filed along with this brief.

[1] Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because (1) it presents the same issue about the proper standard for proving causation under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, as *CSX Transp., Inc. v. McBride*, 598 F.3d 388 (7th Cir.), *cert. granted*, 131 S. Ct. 644 (U.S. Nov. 29, 2010) (No. 10-235), and (2) the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of its own safety regulation will have profound implications for the rail industry and its locomotive fleet.

This *amicus* brief focuses on that second issue. Contrary to the ruling below that evidence of the presence of any diesel exhaust in a locomotive cab constitutes a violation of 49 C.F.R. §229.43(a), requiring a finding of negligence per se under FELA, the language of the regulation does not compel such a conclusion. Consistent with the regulation's language and intent, FRA's enforcement efforts under §229.43(a) have been directed at defects in a locomotive exhaust system and the sufficiency of stack heights. In addition, FRA has stated that it utilizes the OSHA diesel exhaust thresholds—which are designed to provide a safe workplace for employees—to determine compliance with §229.43(a). This interpretation, which the court rejected, is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances.

ARGUMENT

I. THIS COURT SHOULD HOLD THIS CASE PENDING ITS DECISION IN *CSX TRANSP., INC. v. McBRIDE*

AAR agrees with Petitioner that given this Court's grant of certiorari in *CSX Transp., Inc. v. McBride*, the Court, at minimum, should hold this case pending a decision in *McBride*.

II. THE LOWER COURT'S FAILURE TO DEFER TO THE FEDERAL RAILROAD ADMINISTRATION'S INTERPRETATION OF ITS OWN SAFETY REGULATION HAS THE POTENTIAL FOR GREATLY AND IMPROPERLY EXPANDING FELA LIABILITY

FELA provides the exclusive remedy for railroad employees who are injured in the course of their employment. *N.Y. Cent. R.R. v. Winfield*, 244 U.S. 147 (1917). Unlike the workers' compensation systems that cover virtually all other employees in the United States, FELA is a fault-based statute, under which rail employees are entitled to compensation only if they can prove that employer negligence caused their injury. 45 U.S.C. §51; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (FELA "does not make the employer the insurer of the safety of his employees while they are on duty."). Moreover, though FELA abrogated the traditional contributory negligence doctrine under which any negligence by the plaintiff barred recovery, if the employee's negligence is the cause, in part, of the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53. Thus, it was Congress' intent that FELA "makes each party responsible for his own

negligence and requires each to bear the burden thereof." H.R Rep. No. 1386, at 1 (1908).

During the era when FELA was enacted, Congress also passed several railroad safety statutes, among them the Safety Appliances Act, c. 196, 27 Stat. 531 (1893) (now codified at 49 U.S.C. § 20301, *et seq.*), which regulates freight car components, and the Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (now known as the Locomotive Inspection Act (LIA), and codified as amended at 49 U.S.C. §§ 20701-20703), which regulates every aspect of locomotives. *See Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926). These safety statutes do not confer an independent right of action on injured employees, but have come to be viewed substantively, if not in form, as amendments to FELA. Violation of these statutes constitutes negligence as a matter of law in FELA cases. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). Moreover, as an exception to the general rule that each party should bear the consequences of its own negligence, a railroad's violation of a safety statute such as the LIA renders any employee's contributory negligence irrelevant, 45 U.S.C. §53, a feature of FELA that had a substantial impact on the outcome of this case.

In this case, plaintiff was able to avoid the consequences of his substantial contributory negligence by arguing that his injuries were caused by the railroad's violation of 49 C.F.R. §229.43(a), a regulation adopted by the FRA pursuant to its authority under the LIA.[2] Section 229.43(a) states, in relevant part, that

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[2] Authority to promulgate railroad safety regulations was initially delegated to the Interstate Commerce Commission. In

> [p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions.

Section 229.43(a) contains two operative sentences. The first requires that products of combustion be released outside the cab: it does not demand that absolutely no exhaust ever enter the cab once it has been released outside the locomotive. The second sentence is directed at the design of exhaust stacks, requiring that they be high enough to prevent entry of exhaust into the cab under usual operating conditions.

In a ruling affirmed by the Ohio Court of Appeals, the trial court denied Petitioner's motion for a judgment notwithstanding the verdict (JONV), sustaining the jury's finding that §229.43(a), and thus, the LIA, was violated, despite the lack of evidence that the exhaust systems of the locomotives operated by plaintiff were defective, or that plaintiff was exposed to a dangerous level of diesel exhaust. Pet. App. at 10a-14a and 32a-33a. In the absence of such evidence, the jury's finding apparently rested on plaintiff's testimony that some diesel exhaust entered the locomotive cab and the plaintiff's expert's opinion that this constituted a violation of the FRA regulation. Pet. App. at 12a. Seemingly without consideration of the contrary view held by FRA, the court below concluded that the evidence was sufficient to

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1966, it was transferred to the newly formed Department of Transportation and delegated to FRA. Department of Transportation Act, Pub. L. No. 89-670, §6(c), 80 Stat. 931 (1966).

support a finding of a violation of the regulation, without a determination of whether the locomotive exhaust systems were in compliance with the regulatory requirement or whether the stacks of the locomotives plaintiff operated were deficient in that regard.

Thus, this case raises the issue of the proper interpretation of 49 C.F.R. §229.43(a), and a court's obligation to defer to the views of the federal agency which promulgated the regulation and is charged with its enforcement. When confronted with the issue of whether a safety regulation has been violated, courts must focus on the language, purpose and intent of the regulation. The Secretary of Transportation has plenary power to promulgate regulations "for every area of railroad safety," 49 U.S.C. §20103(a), authority which is exercised by the FRA. As a general matter, in promulgating rail safety regulations, it is not FRA's intent to impose near-impossible obligations on railroads that serve no genuine safety-related purpose. *See* Federal Railroad Administration, Railroad Occupational Safety and Health Standards; Termination, Policy Statement, 43 Fed. Reg. 10584, 10586 (1978) (FRA "must decide what regulations are necessary and feasible.").

Consistent with that approach, when applying §229.43(a), FRA has stated that its focus is on defects (e.g., leaks) in the locomotive exhaust system and the sufficiency of stack heights. Federal Railroad Administration, Locomotive Crashworthiness and Cab Working Conditions, Report to Congress, ch. 7, p.7-1 (1996) (Crashworthiness Report). FRA further explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act," *id.* at 7-2, indicating that the purpose of

§229.43(a) is to protect employees from harmful levels of diesel exhaust, not to assure they work in a pristine environment. FRA's intention expressed in the Crashworthiness Report is in accord with the testimony of Petitioner's expert, the former Director of FRA's Office of Safety Assurance and Compliance. Pet. at 7.[3]

The lower court's approach to interpreting the regulation, without consideration of the evidence of the regulatory intent, was at odds with the fundamental tenets of statutory interpretation, which calls for construing statutes in a way that is consistent with their overall purpose and structure. *See Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 638-39 (1876). This Court has repeatedly explained that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *Sorrells v. United States*, 287 U.S. 435, 447 (1932) (quoting *United States v. Kirby*, 7 Wall. 482, 486-87 (1868)); *United States v. Ryan*, 284 U.S. 167, 175 (1931); *United States v. Katz*, 271 U.S. 354, 357 (1926); *See also Hawaii v. Mankichi*, 190

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[3] In contrast to the court below, a District Court in Illinois did consider FRA's views when interpreting subsection (b) of §229.43, which prohibits the excessive gassing of batteries. In reliance on FRA's views expressed in the Crashworthiness Report, the court denied the plaintiff's summary judgment motion because there was a dispute of fact over whether the OSHA permissible exposure limit was exceeded, noting that "FRA measures excessive gassing of locomotive batteries using the permissible exposure limit ('PEL') developed by" OSHA. *Taylor v. Union Pac. R.R.*, 2010 WL 2977142 at *2 (S.D. Ill. 2010).

U.S. 197, 214 (1903) ("'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'" (quoting *Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892)).

These same principles apply with even greater force to the FRA's interpretations of regulations that it has promulgated. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation"). Nonetheless, as Petitioner points out, the court below gave no weight or deference to FRA's interpretation of its regulation. *See* Pet. at 17-18. That interpretation is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances. While FRA's stated policy recognizes that it would be virtually impossible for locomotive cabs to be perfectly sealed and airtight, its interpretation of the diesel exhaust regulation is fully consistent with the LIA's requirement that locomotives be "in proper condition and safe to operate *without unnecessary danger of personal injury*." 49 U.S.C. §20701(1). (emphasis supplied) Yet the lower court refused to follow the FRA's less rigid, and more reasonable, reading of the regulation, even though the FRA is the agency which promulgated the regulation and which is charged by Congress with its enforcement.

As this case starkly demonstrates, whether a violation has occurred can significantly affect the outcome of a FELA case. The jury found the plaintiff was more than 80 percent responsible for causing both sets of the injuries for which he sought and was

awarded compensation. Pet. App. at 15a, n. 3. But for the finding of an LIA violation, plaintiff's damages award of $872,756, and Petitioner's liability, would have been reduced by plaintiff's percentage of fault, reducing the judgment by many hundreds of thousands of dollars. 45 U.S.C. §53. Thus, if FELA plaintiffs can convert the presence of any diesel exhaust in the cab into an LIA violation, they will no longer be "responsible for [their] own negligence" and "bear the burden thereof." H.R Rep. No. 1386, at 1.

Review of the decision below is crucial because the lower court's failure to defer to the FRA's interpretation of its own regulation will have profound implications for the rail industry's fleet of over 24,000 locomotives.[4] A conclusion that the presence of any diesel exhaust in a locomotive cab, without evidence of defective equipment or levels of exhaust exceeding OSHA threshold limits, potentially renders every locomotive used by railroads in violation of federal law. In another recent decision by an Ohio appellate court which reached a similar conclusion regarding §229.43(a), a plaintiff testified that he was "continuously exposed to diesel exhaust" during his entire career with the railroad, suggesting that virtually every one of the locomotives he had operated violated the regulation. *Battaglia v. Consolidated Rail Corp.*, 2009 WL 3325903 at *1 (Ohio App. 6 Dist. 2009), *petition for cert. filed* July 13, 2010 (No. 10-75). However, FRA, the agency that monitors railroad compliance with safety regulations, has never found such mass violations of §229.43(a).

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[4] *See* Association of American Railroads, *Railroad Facts* 49 (2010 ed.).

FELA suits which include claims of LIA violations similar to the claim asserted by Respondent are not uncommon. Indeed, outcomes like that reached in this case are likely to be repeated. AAR member railroads report they currently face numerous FELA suits in which plaintiffs allege that the presence of diesel exhaust in the locomotive cabs in which they rode constituted a violation of the LIA; over 200 such cases are pending in several northeastern states alone. Other railroads report additional such cases are being filed in other jurisdictions with some regularity. *See e.g.,* Complaint in *Schoenwald v. Union Pac. R.R.*, Civ. No. 09098726 (Dist. Ct. for Salt Lake Cty. filed May 22, 2009) (alleging violation of 49 C.F.R. Part 229.43 "by allowing diesel exhaust fumes to enter into and remain in locomotive cabs"); Complaint in *Wheeler v. Union Pac. R.R.*, No. 1022-CC11405 (Cir. Ct. of City of St. Louis filed Oct. 15, 2010) (alleging, among other things, exposure to diesel fumes and exhaust in violation of 49 C.F.R. 229.43); *see also Payne v. CSX Transp., Inc.*, No. 2-231-07 (Cir. Court for Knox Cty., TN) Motions Argument, pp. 67-69, 74 (Sept. 30, 2009).[5]

If this theory of liability is adopted, as it was by the court below, it would transform FELA by obviating the need for plaintiffs to prove negligent conduct by the railroad and render irrelevant any contributory negligence by the plaintiff. Because the lower court failed to offer a reasoned analysis of how §229.43(a) is

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[5] In the *Payne* case, the judge noted that the implication of the plaintiff's argument was that every locomotive built over the past 50 years would violate the Locomotive Inspection Act. Motions at the Close of Proof, p. 33, Nov. 29, 2010. Interestingly, the plaintiff in *Payne* cited to this case as precedent for his position. *Id.* at 47.

to be interpreted, and given the potential impact that a violation of this regulation can have on the outcome of a FELA case, this Court should grant the petition and provide guidance to lower courts on the need to give proper deference to FRA's interpretation of 49 C.F.R. §229.43(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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